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Supreme Court of the United States

OCTOBER TERM, 1941

No. 1144

JOHN D. MCCOACH, *Trustee*,
Petitioner,

v.

J. ROB GRIFFIN, Administrator of the Estate of Robert D. Gordon, Deceased.

PLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Summary Statements of Facts	2
Questions Presented and Their Answers	2– 6
Conclusion	6– 7

Page

Article 5048 of Vernon's Annotated Revised Civil Statutes of the State of Texas 3

Brammer v. Wilder, 57 S. W. (2d) 571 ..... 3, 4

Cheeves v. Anders, etc., 87 Texas 287, 28 S. W. 274 ..... 2, 3, 4, 5

Shoemaker v. American National Ins. Co., 48 S. W. (2d) 612 ..... 3, 4, 5

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To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

THE RESPONDENTS herewith respectfully submit their reply to the petitioner's petition for writ of certiorari:

In this brief we will direct our reply solely to the first point raised by the petition because, while the previous arguments before this Honorable Court and the Honorable Circuit Court of Appeals were directed to the other points raised by the petitioner, the first point was not raised until the motion for re-hearing, after the second decision of the Circuit Court of Appeals in this cause. The other points, however, were fully argued before each court and were directly covered in the Circuit Court of Appeals' opinion following the opinion of this Honorable Court.

Summary Statement of Facts

The statement of facts in the petitioner's application is correct in so far as it goes, but it omits certain pertinent facts; for instance, while the original beneficiaries made loans to the deceased, Gordon, the petitioner goes on to say that some of these original beneficiaries assigned their interest to three separate assignees and this cause involves only the interest of these three assignees. Then the petitioner continues by saying (Page 4) that "None of the assignees knew Gordon, never made any loans or advancements to him and never had any business dealings with him, except to pay part of the premium of the policy. None of these assignees were related to Gordon by blood or marriage."

What the petitioner omits to state is that none of these assignees were stockholders, shareholders, interest holders or officers, or in any way connected with a corporation, joint stock company or trust estate which was "*doing business for profit.*"

Furthermore, the petitioner fails to state that at all times involved in the instant cause the deceased, Robert D. Gordon, was a citizen of the State of Texas.

Questions Presented and Their Answers

As stated in the caption of this brief, the only reply which we consider it necessary to make to the petition involves a reply to the first point raised by the petitioner, in which it is claimed that the Circuit Court of Appeals has followed the pronouncement of the Supreme Court of Texas in the case of *Cheeves v. Anders, etc.*, 87 Texas 287, 28 S. W. 274, whereas it is claimed by the petitioner that the rule an-

nounced in that case has been changed by statute and overruled by later decisions principally in *Brammer v. Wilder*, 57 S. W. (2d) 571 and *Shoemaker v. American National Ins. Co.*, 48 S. W. (2d) 612.

This, the respondent emphatically denies. But, because the argument now made by the petitioner was not made in the first appeal to the Circuit Court of Appeals and was not presented to this Honorable Court at the time certiorari was previously granted and this case reversed and remanded to the Circuit Court of Appeals, nor was it made in the briefs or arguments before the Circuit Court of Appeals in the second argument and, therefore, was not covered in the opinion of that court, we feel it necessary to reply to the petition for writ of certiorari on this one point only.

It is true that the case of *Cheeves v. Anders supra* was decided in 1894 and it is further true that in 1921 the legislature of Texas enacted what is now Article 5048 of *Vernon's Annotated Revised Civil Statutes of the State of Texas* and it is true that section of the Texas statutes changed the rule of *Cheeves v. Anders*, but it is an elementary rule of construction that that statute changed the previous rule only in the respect covered by the statute. And there is no contention here that any of the prerequisite facts set out in the statute apply to the instant case.

The assignees of the original beneficiaries in this case are not members of "any corporation, partnership or joint stock association, or trust estate, *doing business for profit*." The beneficiaries at the time of Gordon's death were members of only one organization, the "Protection Syndicate," and as shown by its articles of association, set out on Page

9 of the Record, their only business was to pay the premiums on the policy. That does not constitute "doing business for profit."

Brammer v. Wilder, 57 S. W. (2d) 571 was a case in which the facts were covered by the statute and it clearly decided that the rule of public policy announced in the *Cheeves case* had been changed, but it also correctly decided that it had been changed only in the respect covered by the statute.

The other Texas case referred to in the argument is *Shoemaker v. American National Ins. Co.*, 48 S. W. (2d) 612 and in that connection the petitioner quotes from the opinion and makes a very glaring error. The quotation in the petitioner's brief on Page 18 is as follows:

> " 'The insured may assign it (the insurance policy) for a valuable consideration, and pass title thereto, and confer upon the assignee the right to collect the debt at its maturity, *although such assignee has no insurable interest at the time the debt matures.*' (Interpolation ours.) P. 614 (Para. 2.)"

It will be noticed that after the word "it" the petitioner interpolates his own words "(the insurance policy)" thereby leading this court to believe that an insurance policy may be assigned, in Texas. The opinion shows, however, that the "it" referred to in the language quoted is not the insurance policy but the *cash surrender value* of the insurance policy. The petitioner has taken only a portion of a sentence in the opinion. But a reading of the whole sentence shows beyond the peradventure of a doubt what the court intended. The entire meaning, the entire opinion, even the entire holding of the court would be the opposite if the interpolation were correct, but it is not correct. Not only is

this interpolation completely wrong but the conclusion which the petitioner attempts to convey is contrary to the express holding in the very *Shoemaker case* from which the partial quotation is taken.

Furthermore, the petitioner cites this case as authority for his statement that the rule as announced by the Supreme Court of Texas in *Cheeves v. Anders* has been overruled. This may be the petitioner's view but it is not the court's view because, in the first paragraph of the opinion proper, after the statement of facts, the court refers to the case of *Cheeves v. Anders*, and the cases which followed that rule, and specifically stated "if the facts in the case at bar made applicable the principles of law announced in those cases it would have followed them."

Instead of being an authority reversing the principle announced in *Cheeves v. Anders* this *Shoemaker case* is an authority sustaining that case because, in the body of the opinion, the court stated that if the case involved an assignment of an insurance policy then "so much of said contract as related to said insurance policy would be in violation of the public policy of the State and illegal."

Lastly, under this same argument, the petitioner states that the Circuit Court has assumed that the assignees who are involved in this appeal had no insurable interest and, here again, he quotes, as he did in his motion for rehearing before the Circuit Court, a quotation from the conclusions of law, of the District Judge as shown on Page 24 of the record.

We wish to call the court's attention to the fact that the quotation contained in the brief of the petitioner is from language used by the District Judge in referring to the

original beneficiaries *and not to the assignees.* It is impossible to conceive how such a mistake could have been made because immediately following the language quoted the record will show that the court below was asked to make findings concerning the assignees involved in this appeal, and made them.

The petitioner agreed to the record on appeal. That agreement stipulates that "none of the assignees knew Gordon, never made any loans or advancements to him, and never had any business dealings with him, except to pay part of the premiums of the policy. None of the assignees were related to Gordon by blood or marriage." (Record 7.) And yet, on Page 18 of the brief the petitioner contends that there was no finding of a lack of insurable interest in these same assignees. The language could not be clearer than the petitioner's own agreement and yet now it is contended that there is no finding of insurable interest. The statement of the matter, of course, answers the argument presented.

Conclusion

As we have stated before, we feel it unnecessary to answer the brief of the petitioner as to all of the other points referred to therein because they were adequately covered in the printed briefs and other oral arguments twice before the Circuit Court of Appeals and once before this Honorable Court. The foregoing matter was, however, brought before the Circuit Court only after the written opinion was filed for the second time. It was brought out in the motion for rehearing and, therefore, was not referred to in the written opinion. For that reason only we feel called upon

to direct at least the attention of the court to the errors in the statements which have been made.

Respectfully submitted,

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